(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Cape Wind Associates, LLC	)	OCS Appeal No. 11-01
OCS Permit No. OCS-RI-01	)	

[Decided May 20, 2011]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

IN RE CAPE WIND ASSOCIATES, LLC

OCS Appeal No. 11-01

ORDER DENYING REVIEW

Decided May 20, 2011

SYLLABUS

On January 7, 2011, U.S. Environmental Protection Agency Region 1 ("Region") issued an Outer Continental Shelf ("OCS") Permit, Number OCS-RI-01 ("Permit"), to Cape Wind Associates, LLC. ("Cape Wind"). The Permit would authorize Cape Wind to construct ("Phase 1") and operate ("Phase 2") 130 wind turbine generators ("Project") in Nantucket Sound off the cost of Massachusetts. The Alliance to Protect Nantucket Sound and the Wampanoag Tribe of Gay Head/Aquinnah (collectively "Petitioners") jointly filed a petition requesting the Board grant review of the Permit. Both the Region and Cape Wind filed responses to the petition, arguing that the Board should not grant review.

Petitioners argue that the administrative record is procedurally and substantively flawed such that it was clear error for the Region to rely on the administrative record in determining that emissions from the Project's Phase 1 will comply with the new 1-hour national ambient air quality standards ("NAAQS") for nitrogen oxides ("NO_X") and sulfur dioxide ("SO_2"). Petitioners also argue that a potential change to Cape Wind's construction plan, which was reported after the close of public comment, renders clearly erroneous a material factual finding the Region made in reaching its permitting decision such that an additional analysis and reconsideration of that decision is necessitated.

Held: The Board denies review. Petitioners have not met their burden of demonstrating that review is warranted on any of the grounds presented.

(1) The Board concludes that the Petitioners failed to sustain their burden of demonstrating clear error or abuse of discretion in the Region's decision that the Project's Phase 1 air emissions will comply with the new 1-hour NO_X and SO_2 NAAQS. It was not clear error for the Region, in responding to public comments, to review and rely on NO_X and SO_2 modeling data made part of the administrative record after the close of public comment. The Board rejects both the Petitioners' contention that the modeling data are not part of the administrative record, and Petitioners' contention that the Region was required to reopen public comment on the modeling data.

(2) With respect to Petitioners' allegation that, after the close of public comment, a potential change to Cape Wind's construction plan was reported necessitating

further analysis and reconsideration of the Region's permitting decision, the Board concludes that Petitioners have failed to show that Cape Wind will not construct the Project as described in Cape Wind's permit application. Cape Wind is entitled to proceed with the Project as originally planned, even while it contemplates, and seeks any necessary regulatory approvals for, a change in the Project or its construction.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *STATEMENT OF THE CASE*

On January 7, 2011, pursuant to Clean Air Act ("CAA" or the "Act") section 328, 42 U.S.C. § 7627, U.S. Environmental Protection Agency ("EPA" or "Agency") Region 1 ("Region") issued an Outer Continental Shelf ("OCS") Permit, Number OCS-RI-01 ("Permit"), to Cape Wind Associates, LLC ("Cape Wind"). The Permit would authorize Cape Wind "to construct and operate 130 wind turbine generators (WTGs) and other supporting equipment (The Project) in a grid pattern on or near the Horseshoe Shoal in Nantucket Sound off the coast of Massachusetts." Permit at 1. The Permit establishes the conditions and limitations that govern air pollutant emissions from the Project's construction ("Phase 1") and operation ("Phase 2"). *Id.*

OCS permits are governed by 40 C.F.R. part 55 and the procedural rules set forth in 40 C.F.R. part 124. *See* 40 C.F.R. § 55.6(a)(3). The part 124 rules, among other things, grant persons who participated in the public comment process on the draft OCS permit the right to petition the Environmental Appeals Board to review the Permit's conditions. Here, the Alliance to Protect Nantucket Sound ("APNS") and the Wampanoag Tribe of Gay Head/Aquinnah jointly filed a petition requesting the Board grant review of the Permit. There is no dispute that the Alliance and Wamponoag Tribe (collectively "Petitioners") have standing to file their petition for review. Both the Region and Cape

Wind filed responses to the petition, arguing that the Board should not grant review.

II. *ISSUES ON APPEAL*

1. Have Petitioners demonstrated that the administrative record is procedurally or substantively flawed such that it was clear error for the Region to rely on this record in determining that emissions from the Project's Phase 1 will comply with the new 1-hour national ambient air quality standards ("NAAQS")[1] for nitrogen oxides ("NO_X") and sulfur dioxide ("SO_2")?

2. Have Petitioners demonstrated that a potential change to Cape Wind's construction plan, which was reported after the close of public comment, renders clearly erroneous a material factual finding the Region made in reaching its permitting decision such that an additional analysis and reconsideration of that decision is necessitated?

III. *SUMMARY OF DECISION*

The Board concludes, as explained in the analysis section below, the Petitioners failed to sustain their burden of demonstrating clear error or abuse of discretion in the Region's decision that the Project's Phase 1 air emissions will comply with the new 1-hour NO_X and SO_2 NAAQS. That decision was based on modeling data the Region added to the administrative record in response to comments, and the administrative record was not thereafter reopened for further public comment. The

[1] The NAAQS are air quality standards for particular pollutants "measured in terms of total concentration of a pollutant in the atmosphere." Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual* C.3 (draft Oct. 1990) ("NSR Manual"). The Agency has set NAAQS for six criteria pollutants: sulfur oxides, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. *See* 40 C.F.R. §§ 50.4 -.13. The Act further directs EPA to designate geographic areas within states, on a pollutant-by-pollutant basis, as being either in attainment or in nonattainment with the NAAQS, or as being unclassifiable. CAA § 107(d), 42 U.S.C. § 7407(d).

Board rejects both Petitioners' contention that the modeling data are not part of the administrative record and Petitioners' contention that the Region was required to reopen public comment on the modeling data.

With respect to Petitioners' allegation that, after the close of public comment, a change to Cape Wind's construction plan was reported necessitating further analysis and reconsideration of the Region's permitting decision, the Board concludes that Petitioners have failed to show that Cape Wind will not construct the Project as described in Cape Wind's permit application.

IV. *STANDARD OF REVIEW*

The regulations applicable to OCS permits state that "the Administrator will follow the procedures in [40 C.F.R.] part 124 used to issue Prevention of Significant Deterioration ("PSD") permits" when processing OCS PSD permits. 40 C.F.R. § 55.6(a)(3). The Board does not ordinarily review a permit decision under the part 124 rules unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *accord In re Power Holdings of Ill., LLC*, PSD Appeal No. 09-04, slip op. at 4 (EAB Aug 13, 2010), 14 E.A.D. ___; *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 369 (EAB 2007); *In re Cardinal FG Co.*, 12 E.A.D. 153, 160 (EAB 2005). The preamble to the part 124 regulations states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord Shell*, 13 E.A.D. at 369; *Cardinal FG*, 12 E.A.D. at 160. Petitioners bear the burden of demonstrating that review is warranted, and Petitioners must raise specific objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review. *Power Holdings*, slip op. at 4, 14 E.A.D. at __; *In re BP Cherry Point*, 12 E.A.D. 209, 217 (EAB 2005); *In re Steel Dynamics, Inc.*, 9 E.A.D.

740, 744 (EAB 2001); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

When evaluating a permit appeal, the Board determines whether the permit issuer's rationale for its conclusions is adequately explained and supported by the administrative record. *E.g.*, *Shell*, 13 E.A.D. at 386; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417 (EAB 1997) ("[T]he Region 'must articulate with reasonable clarity the reasons for [its] conclusions and the significance of the crucial facts in reaching those conclusions.'" (quoting *In re Carolina Power & Light Co.*, 1 E.A.D. 448, 451 (Act'g Adm'r 1978))). In other words, the record must demonstrate that the permit issuer "exercised his or her considered judgment" when making permit determinations. *In re San Jacinto River Auth.*, NPDES Appeal No. 09-09, slip op. at 5 (EAB July 16, 2010) (internal quote omitted), 14 E.A.D. ___; *accord In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 175 (EAB 1999) (remanding permit because "there are no details regarding [the region's] determination in the administrative record" that would allow the Board "to judge the adequacy of the Region's analysis"); *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (remanding permit for region to clarify the differing rationales given for making a permit determination); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (administrative record must reflect "considered judgment" necessary to support region's permit determination).

V. *FACTUAL AND PROCEDURAL HISTORY*

Cape Wind filed an application for an OCS permit for the Project on December 17, 2008, and provided supplemental information in support of its application through June 2010. On June 11, 2010, the Region issued its draft permit and "Fact Sheet" for the Project and solicited public comment through July 16, 2010, including three public hearings held on July 13, 14, and 15, 2010. U.S. EPA Region 1, Fact Sheet: Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project (June 11, 2010) (A.R. 63) ("Fact Sheet"). The Fact Sheet

described the Project, identified the applicable laws governing the air permitting requirements, and set forth the Region's analysis explaining the basis for the draft permit's conditions and the Region's analysis that the Project will comply with all applicable air quality and emissions limitation requirements. After the close of public comment, the Region responded to comments in part by adding new information to the administrative record as described below and by preparing a formal response to comments, which the Region issued along with its final permit decision on January 7, 2011. *See* U.S. EPA Region 1, Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project, Response to Comments (Dec. 23, 2010) (A.R. 112) ("Response to Comments").

The Region's analysis divided the Project into three phases with "Phase 1" consisting of all pre-construction and construction activity not to exceed 36 months, "Phase 2" consisting of the Project's operational activities (which would include operation, maintenance, and repair through the Project's life-span), and "Phase 3" consisting of decommissioning and removal of the Project. Fact Sheet at 5. The Permit governs only Phase 1 and Phase 2 and requires Cape Wind to apply for a permit governing the decommissioning of the Project in Phase 3, when that becomes necessary. *Id.*

The Project will be located in an area that is designated as nonattainment for ozone. *Id.* at 32. An important precursor to ozone is NO_X, and the Project's Phase 1 (construction) will emit NO_X in excess of the major source threshold level of 50 tons per year under the Massachusetts nonattainment new source review regulations, 310 Mass. Code Regs. 7.00 app. A.[2] Fact Sheet at 32. The Region, therefore, determined that the Project's Phase 1 NO_X emissions must comply with Massachusetts' nonattainment new source review requirements. *Id.* at 24. The Region also explained that the Phase 1 emissions of NO_X and certain other pollutants are subject to Massachusetts' minor source "Plan Approval and Emissions Limitations" requirements. *Id.* For Phase 2

[2] OCS sources located within 25 miles of a State's seaward boundary are subject to the same requirements as would be applicable if the source were located in the "corresponding on shore area" as determined by EPA. CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1). Here, the Region designated Massachusetts as the corresponding on shore area for the Project. Fact Sheet at 11. By a Federal Register notice, EPA incorporated by reference into 40 C.F.R. § 55.14 and Appendix A to 40 C.F.R. part 55 the Massachusetts regulations governing the Project's permitting requirements. *See* Outer Continental Shelf Air Regulations Consistency Update for Massachusetts, 73 Fed. Reg. 53,718, 53,721 (Sept. 17, 2008).

(Project operation), Cape Wind requested a NO_X Permit limit requiring the Project's NO_X emissions to remain below the nonattainment major source threshold of 50 tons per year, and accordingly, the Region determined that only minor source requirements would apply during the Project's Phase 2 operation. *Id.* at 26-27. The PSD thresholds are not exceeded for any pollutant in attainment status in either Phase 1 or Phase 2, and therefore, the Region concluded that the PSD requirements do not apply. *Id.* at 26.

VI. *ANALYSIS*

A. *Petitioners Have Not Demonstrated That the Administrative Record Is Procedurally or Substantively Flawed Such that it Was Clear Error for the Region to Rely on this Record in Determining that Emissions from the Project's Phase 1 Will Comply with the New 1-hour NO_X and SO_2 NAAQS*

1. *Procedural Challenges*

During public comment, APNS objected that the Region had not evaluated whether the Project's air emissions would comply with the recently-promulgated 1-hour NAAQS for NO_X and SO_2. After the close of public comment, the Region requested that Cape Wind provide modeling to demonstrate compliance with the new 1-hour NO_X and SO_2 NAAQS, and Cape Wind provided that modeling data on November 4, 2010. Cape Wind provided supplemental analyses in November and December, 2010, in response to the Region's further requests. Response to Comments at 16. The Region explained in its Response to Comments that "Cape Wind's modeling demonstration and supplemental responses[] are included in the administrative record and incorporated by reference into this comment." *Id.* The Region stated further that it "reviewed Cape Wind's analysis and agrees that Cape Wind's construction emissions will not cause or contribute to an exceedance of the revised 1-hour NO_X or SO_2 standards." *Id.*

Now, on appeal, Petitioners argue that the new modeling Cape Wind provided to demonstrate compliance with the 1-hour NO_X and SO_2 NAAQS is not in the administrative record. Petition at 14-15, 18-22. Petitioners also argue that the Region was required to reopen the public comment period based on this new information because, according to Petitioners, the new information raises substantial new questions. *Id.* at 22-25.

For the following reasons, the Board concludes that the air emissions modeling Cape Wind provided demonstrating that the Project's Phase 1 air emissions will comply with the new 1-hour NO_X and SO_2 NAAQS is part of the administrative record, and that the Petitioners have failed to sustain their burden of demonstrating clear error or abuse of discretion in the Region's decision to add data to the administrative record without reopening public comment. The Petitioners' first argument – that the data and documents Cape Wind provided in response to the Region's request for modeling demonstrating compliance with the new 1-hour NO_X and SO_2 NAAQS are not part of the administrative record – is without merit. The administrative record for the Region's final permitting decision is defined by 40 C.F.R. §§ 124.17(b) and 18(b). Relevant here, the regulations state that "any documents cited in the response to comments shall be included in the administrative record for the final permit decision." 40 C.F.R. § 124.17(b). Further, "[i]f new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record." *Id.* And, "[t]he administrative record for any final permit shall consist of * * * [t]he response to comments required by § 124.17 and any new material placed in the record under that section." *Id.* § 124.18(b)(4).

In the present case, the Region requested the new modeling data from Cape Wind when the Region was developing its responses to the public comments, and the Region clearly stated in its Response to Comments that "Cape Wind's modeling demonstration and supplemental responses[] are included in the administrative record and incorporated by reference into this comment." Response to Comments at 16. The Region also identified its own analysis of Cape Wind's modeling data, which is set forth in a separate memorandum. *See* Memorandum from Brian Hennessey, EPA, to Ida McDonnell, EPA (Dec. 21, 2010) (A.R. 109) [hereinafter "Hennessey December 2010 Memorandum"]. Accordingly, there is no question that the modeling data and documents Cape Wind provided to the Region, which the Region relied upon in making its decision and identified in its Response to Comments, are part of the administrative record for the Region's permitting decision. *See In re Mayaguez Reg'l Sewage Treatment Plant,* 4 E.A.D. 772, 776 n.7 (EAB 1993) ("The Report was cited on page 32 of the Region's response to comments * * * and therefore became part of the administrative record."), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. U.S. EPA*, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995); *see also In re Ash Grove Cement Co.,* 7 E.A.D. 387, 427-28 (EAB 1997) (document omitted from the certified index of the administrative record

and not identified by title, author, or date in the response to comments, nevertheless, was part of administrative record supporting the permit issuer's decision).

At bottom, Petitioners' complaint amounts to nothing more than an objection that the Region should have posted on its website all documents submitted by Cape Wind.[3] There is no question that Petitioners were provided adequate notice regarding the specific documents and files at issue. The Region posted a copy of the Hennessey December 2010 Memorandum on the Region's website, and that memoroandum contains document icons identifying the files the Region received from Cape Wind. And, as noted, the Region referred to those documents in its Response to Comments. Response to Comments at 16.

Petitioners have not alleged that they made any attempt to request the modeling data from the Region.[4] In fact, Petitioners were previously provided a contact person, Mr. Brendan Cahill, with a designated phone number and email address, should additional information be desired. *See* U.S. EPA Region 1, Public Notice of Proposed Federal Outer Continental Shelf Air Permit Approval, Public Comment Period, and Public Hearings at 4 (June 8, 2010) (A.R. 61). The Board has held that the permit issuer does not have an obligation to provide an electronically accessible copy of the administrative record on the permit issuer's website, or to provide an electronic index to the administrative record. *See In re Russell City Energy Ctr*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 130 (EAB Nov. 18, 2010) (not required to maintain an electronic administrative record docket on website); *In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 529-30 (EAB 2006) (no requirement to create electronic index). Thus, the mere fact that certain data and documents are not available on the Region's website does not take those documents out of the administrative record, particularly where, as here, the Region specifically stated in its Response to Comments that the data and documents are

[3] Petitioners allege that "the Region did not provide access to the model or its output" used to reach the Region's decision that the Project will comply with the 1-hour NO_X and SO_2 NAAQS. Petition at 12; *see also* Petitioner's Reply at 9-10.

[4] This is not a case where the Petitioners claim an irregularity in the Region's decisionmaking based on the Region denying Petitioners access to the documents contained in the administrative record. The Petitioners have not alleged that they requested copies of the documents or data from the Region, and, as discussed in the text above, the Region was not required to make all documents available on its website.

included in the administrative record for its decision.[5] 40 C.F.R. §§ 124.17(b), .18(b)(4).

The Petitioners's second argument – that the modeling data the Region added to the administrative record raise substantial new questions requiring the Region to reopen the public comment period to solicit comment on the new modeling data – is also without merit. As is evident from the Board's rejection of the Petitioners' first argument, when new issues are raised during the public comment period, the permitting office is authorized to supplement the administrative record with new information and to revise its analysis. *See* 40 C.F.R. §§ 124.17(a) (requiring the response to comments to identify changes to the draft permit and to include a response to all significant comments), .17(b) (authorizing EPA permit issuers to add new material to the administrative record in response to comments), .18(b) (defining the administrative record).

Alternatively, the regulations also authorize the permit issuer to reopen or extend the public comment period to give interested persons an opportunity to comment on information or arguments submitted

[5] Petitioners' new argument made for the first time in its reply brief regarding an Executive Order, a Memorandum from the President, and a Memorandum from the Administrator are untimely, not applicable, and not grounds for remand in the present case. *See* Petitioner's Reply at 9-11 (citing Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011) (entitled Improving Regulation and Regulatory Review); Memorandum from President Barack Obama, 74 Fed. Reg. 4683 (Jan. 21, 2009) (entitled Freedom of Information Act); Memorandum from Lisa Jackson, Administrator, U.S. EPA, to All EPA Employees (Jan. 23, 2009)). First, Petitioners may not raise new arguments for the first time in their reply brief on appeal. *Dominion*, 12 E.A.D. at 595; *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 126 n.9 (EAB 1999). Second, the Executive Order is applicable to rulemakings and, under its terms, is not applicable to the Region's permitting proceeding, which is an informal adjudication. *See* Exec. Order No. 13,563, § 1,76 Fed. Reg. at 3821. Third, the President's Memorandum expressly creates no "right or benefit, substantive or procedural." 74 Fed. Reg. at 4683. Finally, the extensive collection of documents the Region provided on its website in this case complies with Administrator Jackson's Memorandum (and is consistent with the spirit of the Executive Order and the President's Memorandum calling for online posting to the extent feasible, *see, e.g.,* Exec. Order No. 13,563, 76 Fed. Reg. at 3821). The Region placed significant documents on its website without waiting for requests. The Region was not required to anticipate all potential requests, nor was it required to post all documents on its website. Administrator Jackson's Memorandum did not relieve Petitioners from their obligation to request any documents they believe they needed to prepare their petition for review. Nothing in any of the cited documents overrides the provisions of the regulations stating that documents referenced in the permit issuer's response to comments are in the administrative record. 40 C.F.R. §§ 124.17(b), .18(b)(4).

during the public comment period that "appear to raise substantial new questions concerning" the permit. 40 C.F.R. § 124.14(b)(3). The regulations state that the permit issuer "may take" this latter approach of reopening the public comment period, and the Board has consistently held that the decision whether to reopen public comment is one that falls within the permit issuer's discretion to which the Board will ordinarily defer.[6] *See In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 759-60 (EAB 2008); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 416 (EAB 2007); *In re Prairie State Generating Co.*, 13 E.A.D. 1, 49 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 06-3907 (7th Cir. 2007); *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 586-88 (EAB 1998), *aff'd sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999).[7] The Board finds no clear error in the Region's decision to finalize the Permit without further public comment on the NO_X and SO_2 modeling the Region added to the administrative record after the close of public comment.

2. *Compliance with the 1-Hour NO_X and SO_2 NAAQS*

Petitioners argue that they "raise serious questions" regarding the Region's analysis of the Project's compliance with the new 1-hour NO_X and SO_2 NAAQS.[8] Petition at 23. Petitioners' alleged "serious questions," however, are limited to speculation regarding information

[6] The present case is not one where the permit issuer changed the terms of the permit in response to comments and where the Board must analyze the additional question whether the revised permit is a "logical outgrowth" of the draft permit. *See In re D.C. Water & Sewer Auth.*, 13 E.A.D. at 759-60. This also is not a case where the permit issuer failed to adequately explain its reasons for changing the permit's terms. *See In re Indeck-Elwood, LLC,* 13 E.A.D. 126, 146-47 (EAB 2006); *In re Amoco Oil Co.,* 4 E.A.D. 954, 980-81 (EAB 1993); *In re GSX Services of South Carolina, Inc.,* 4 E.A.D. 451, 467 (EAB 1992). Instead, in the present case, the new information added to the record supported the Region's decision that no changes were required to the draft permit in order to comply with the new NAAQS.

[7] Further, "[i]t is well settled that 'the decision to reopen the public comment period is largely discretionary' upon the Regional Administrator's finding that the new questions are 'substantial.'" *In re Envtl. Disposal Sys., Inc.,* UIC Appeal No. 07-03, slip op. at 42 (EAB July 18, 2008), 14 E.A.D. __ (*quoting Dominion*, 12 E.A.D. at 695).

[8] Petitioners also argue that the Region's four-page memorandum analyzing the modeling data is, standing alone, inadequate to support the Region's decision as expressed in its response to comments. Petition at 26-27. This contention is rejected. The Region's memorandum does not stand alone, but is supported by the modeling data Cape Wind provided and which the Region added to the administrative record as discussed above.

that Petitioners admit may be answered by the modeling data Cape Wind supplied, which Petitioners could have requested. As discussed above, the Region added the modeling data to the administrative record and described it in the Region's Response to Comments. Petitioners assert that "[o]nly with an opportunity to see and comment upon the entire documentary record of the one-hour NAAQS modeling can Petitioners know whether [the questions Petitioners identify], or other issues, are of concern." *Id.*

Petitioners, however, misapprehend their responsibility and burden in filing a petition for review. The Board has long held that "the opportunity for [the petitioner] to review items added to the administrative record occurred after the Region issued its final permit decision and before the deadline for filing petitions for review with the Board." *Ash Grove*, 7 E.A.D. at 431. Similarly, "Petitioners' opportunity to express disagreement with the Region's final permit decision, including the Region's reliance on the Schlumberger letter [new information added to the record after the close of public comment], is not through a reopened public comment period, but by way of an appeal to the Board." *NE Hub Partners,* 7 E.A.D. at 587 n.14; *see also Dominion,* 13 E.A.D. at 418 ("[T]he appellate review process can serve as a petitioner's first opportunity to question the validity of material added to the administrative record in response to public comment * * *."); *In re American Soda, LLP,* 9 E.A.D. 280, 299 (EAB 2000) (same); *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 705 n.19 (EAB 2000) (explaining that the appeals process afforded petitioner the opportunity to question the validity of a document added to the administrative record after the comment period closed). In other words, the Region's Response to Comments provided the Petitioners notice regarding the Region's analysis and the evidence added to the administrative record that the Region relied upon in making its decision.[9] The Petitioners then had the opportunity of the appeal period to request the relevant documents from the Region[10] and to challenge those documents in the form of a petition for review explaining why the Region's analysis was clearly erroneous.

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[9] This is not a case where the permit issuer failed to respond to the comments raised in the public comment period and then seeks to introduce its response as part of its briefing on appeal. *See, e.g., In re Amerada Hess Corp.,* 12 E.A.D. 1 (EAB 2005).

[10] The Petitioners have not alleged that the Region delayed producing any documents the Petitioners requested; indeed, Petitioners have not alleged that they contacted the Region to obtain any documents added to the administrative record in response to public comments.

Confronted with a similar situation in *Prairie State*, the Board explained as follows:

> Petitioners have not identified on appeal any information that they would submit into the record, if it were reopened, to establish grounds for changing the Permit's terms. Instead, Petitioners simply imply that reopening the record might produce some speculative body of evidence. This is simply not a sufficient basis for introducing further delay in issuing the Permit at this late stage in the administrative decisionmaking process.

Prairie State, 13 E.A.D. at 50. In the present case, the Petitioners merely raise "areas of inquiry" and "questions" about documents that are part of the administrative record – questions that Petitioners admit may be answered if they had reviewed the documents, but the Petitioners did not request copies of those documents before filing their petition. Petition at 23-25. "The Board will not overturn a permit provision based on speculative arguments" or in this case speculative questions. *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001). To the contrary, Petitioners' burden at this stage is to demonstrate that the Region made "a finding of fact or conclusion of law which is clearly erroneous" or an exercise of discretion or an important policy consideration that the Board should review. 40 C.F.R. § 124.19(a). Because Petitioners did not take advantage of the opportunity available to them and did not request copies of the documents at issue during the appeal period, Petitioners' speculative challenge to the Region's determination of compliance with the new NO_X and SO_2 standard must be denied.

The Region's Response to Comments, which referred to the Hennessey December 2010 Memorandum, demonstrates that (1) the Region considered the public comments on the new 1-hour NO_X and SO_2 NAAQS, (2) the Region requested additional information from Cape Wind modeling that the Project will comply with those NAAQS, and (3) the Region analyzed and adopted the compliance demonstration as sufficient to establish that Cape Wind's construction of the Project will not violate the 1-hour NO_X and SO_2 NAAQS. Petitioners' speculative questions are insufficient to demonstrate clear error in the Region's analysis or to show that the Region's response was inadequate. Air quality modeling is "technical in nature" requiring "'specialized expertise and experience'" for which the petitioner bears a particularly heavy burden to demonstrate clear error. *In re Shell Offshore, Inc.,* 13 E.A.D. 357, 397-98 (EAB 2007) (*quoting In re Peabody W. Coal Co.*,

12 E.A.D. 22, 33 (EAB 2005)). Petitioners cannot – and have not– satisfied their burden by only raising speculative questions about data and modeling that they could have, but did not, request from the Region. Because Petitioners have not sustained their burden of demonstrating that the Region's analysis of the air quality modeling is based on a clearly erroneous finding of fact or conclusion of law, the Board denies review of the Region's determination that Cape Wind's construction of the Project will not violate the new 1-hour NO_X and SO_2 NAAQS.

B. *Petitioners Have Not Demonstrated That a Potential Change to Cape Wind's Construction Plan, Which Was Reported After the Close of Public Comment, Renders Clearly Erroneous a Material Factual Finding the Region Made in Reaching its Permitting Decision*

Petitioners argue that "[a] change in the Cape Wind project announced subsequent to the close of public comment * * * requires remand to Region 1 for a new analysis of the air quality impact of the proposed project." Petition at 16. Petitioners allege that the construction "staging location has since been moved from Rhode Island to New Bedford, Massachusetts." *Id.* at 32. Petitioners contend that "the facts on which the permit decision was based have significantly changed, rendering the findings of fact and conclusions of law incorrect." *Id.* at 34.

The Board concludes that Petitioners have failed to sustain their burden of demonstrating that the Region's decision is based on a clearly erroneous finding of fact material to the Region's final permitting decision. The evidence the Petitioners offer in support of their contention is admissible on appeal, but that evidence does not establish that Cape Wind will not, under any circumstance, proceed with the Project as described in Cape Wind's permit application.

The Board rejects the Region's and Cape Wind's requests[11] that the Board not consider the evidence the Petitioners present as allegedly establishing that Cape Wind no longer intends to construct the facility as described in its permit application. Although the Board does not ordinarily consider new evidence offered for the first time on appeal

[11] Region's Response to Petition for Review at 86; Region's Opposition to Petitioners' Motions for Leave to Supplement Record and to File a Reply Brief at 4; Cape Wind Associates, LLC's Opposition to Petitioners' Motions to Supplement the Record and to File a Reply at 1-4.

where the relevant issue was ascertainable during the public comment period, *see Dominion*, 12 E.A.D. at 518-19, nevertheless, in appropriate circumstances, the Board has considered new evidence submitted on appeal demonstrating apparently changed circumstances such that the permit applicant no longer intends to construct the facility described in the permit application. *See In re W. Suburban Recycling & Energy Ctr., LP,* 8 E.A.D. 192 (EAB 1999); *In re Mercer & Atlantic Cntys. Res. Recovery Facility,* PSD Appeal No. 96-7 (EAB June 24, 1997) (Remand Order), *available at www.epa.gov/eab/orders/mercer.pdf*. In *West Suburban*, the Board remanded the permit after the Board observed that the evidence indicated that the project would not be "completed as described in [the] permit application." *West Suburban,* 8 E.A.D. at 197. In addition, the Board has remanded where the permit issuer added a new permit condition without providing an opportunity for public comment where the new condition would have allowed the applicant to make changes to the proposed facility's design. *In re Indeck-Elwood, LLC.*, 13 E.A.D. 126, 147-48 (EAB 2006) (noting that the air emissions of the modified facility design had not been subject to public comment). Thus, it is appropriate for the Board to consider Petitioners' evidence allegedly showing that Cape Wind no longer intends to construct the facility as described in its permit application. *See, e.g.*, Petition at 32, App.E (Press Release, Cape Wind, Cape Wind Completes Permitting Process, (Jan. 7, 2011)) [hereinafter Cape Wind's January Press Release] (stating that there will be a new port facility built in New Bedford, Massachusetts, and that "Cape Wind will be this facility's first customer").[12]

Petitioners allege that Cape Wind intends to change the construction staging location for the Project from Rhode Island to Massachusetts, and that this change requires "a new analysis of the air quality impact of the proposed project." Petition at 16. As evidence of this change, Petitioners point to Cape Wind's press release issued on January 7, 2011 (which stated that "[l]ast October, Massachusetts Governor Deval Patrick announced the creation of a new multi-purpose Marine Commerce Terminal in the port of New Bedford that will be the first facility in North America designed for the staging and assembly of offshore wind turbines and Cape Wind will be this facility's first customer."). *See* Cape Wind's January Press Release. Petitioners also point to the Region's own communication with Cape Wind, which the Region sent to Cape Wind after the Massachusetts Governor made the announcement mentioned in Cape Wind's news release. *See* Petitioners' Reply Brief at 3 (citing Letter from Stephen Perkins, Dir., Office of

[12] *This press release is also available at* www.capewind.org/news1174.htm.

Ecosystem Prot., EPA Region 1, to Dennis Duffy, Vice President of Regulatory Affairs, Cape Wind Assocs. (Oct. 29, 2010)). Petitioners also point to an email Petitioners obtained using Massachusetts' freedom of information act. *See* Petitioners' Motion to Supplement the Record at 2 (discussing E-mail from Kristin Decas, Exec. Dir., New Bedford Harbor Dev. Comm., to Scott W. Lang, Mayor, New Bedford, & Matthew Morrissey, Exec. Dir., New Bedford Econ. Dev. Council (Feb. 24, 2011)). Just as it is appropriate for the Board to consider this evidence of an alleged change to the Project that Petitioners identify, including evidence that was not part of the administrative record when the Region made its decision, it is similarly appropriate for the Board to consider the declaration Cape Wind submitted regarding its intention to construct the facility as described in its permit application. *See* Cape Wind's Response to Petition for Review, Ex. 1 (Decl. of James S. Gordon).

Upon considering the evidence Petitioners provided and the declaration Cape Wind provided, the Board concludes that Petitioners' evidence does not establish clear error in any of the Region's factual findings material to the Region's decision. First, Petitioners' evidence does not show the type of clear, unequivocal intention not to proceed, under any circumstance, with the Project as proposed in the permit application that the Board has found warranted remand in prior cases. The *West Suburban* and *Mercer* cases demonstrate that, in limited circumstances where evidence presented on appeal makes clear the permit applicant will not construct the facility as described in the permit application, the Board will remand the permit. *West Suburban,* 8 E.A.D. 195-97; *Mercer,* at 1-8. These cases do not present grounds for remand where the permit applicant desires to change the project plan, but where the permit applicant still has the ability to proceed with the project as proposed in the permit application. For example, in *West Suburban*, the Board considered evidence that, during the appeal process, the permit applicant sold the property where the facility was to be located and thus no longer had the ability to construct the facility. 8 E.A.D. at 193-94. Similarly, in *Mercer*, the Board considered evidence that the permit applicant no longer had the ability to obtain financing for the proposed facility. *Mercer*, at 1-8 (the Board remanded for the permit issuer to take evidence on whether the applicant had the ability to proceed with the proposed facility).

In the present case, while Petitioners' evidence when considered in the light most favorable to Petitioners only demonstrates that Cape Wind may change the staging location for the Project's construction

activity, Petitioners' evidence does not show that Cape Wind no longer has the ability to proceed with the project as proposed. Thus, Petitioners' evidence does not contradict Cape Wind's letter to the Region on November 17, 2010, and subsequent declaration stating that "(1) it is unclear whether the New Bedford facility will be completed and available on a timeline consistent with Cape Wind's project construction requirements; (2) Cape Wind ha[s] not altered its project plans to change its staging area from Quonset to New Bedford and therefore ha[s] not revised any portion of the air permit application; and (3) if Cape Wind were to amend its project plan to use the New Bedford facility as a staging area in the future, Cape Wind would make any required regulatory filings at that time." Decl. of James S. Gordon at 2; *see also* Letter from Dennis J. Duffy, Vice President, Cape Wind Assocs., to Stephen S. Perkins, U.S. EPA Region 1 (Nov. 17, 2010) (A.R. 102). Rather than exhibiting any intent to mislead (as Petitioners have alleged),[13] Cape Wind's statements, including its Press Release, indicate a transparent desire to change construction staging locations only if all necessary contingencies are resolved, one of which is obtaining any necessary regulatory approvals for the change. Declaration of James S. Gordon at 1. Petitioners have presented no evidence that Cape Wind will not proceed with the Project as described in the permit application if any of the contingencies for changing the construction staging location are not resolved to Cape Wind's satisfaction. The Board, therefore, concludes that cause does not exist to remand the Permit to the Region. Cape Wind is entitled to proceed with the Project as originally planned, even while it contemplates, and seeks any necessary regulatory approvals for, a change in the Project or its construction.[14] Accordingly, the Board denies review on this issue.[15]

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[13] Petitioners allege that Cape Wind is attempting "to deceive the government" to "bypass all of the cumbersome process that revealing [Cape Wind's] *actual* intentions would trigger – in other words, review of the project as it will actually be built." Petitioners' Reply Brief at 2. The Board grants the Petitioners' request to file Petitioners' Reply Brief. *See* Petitioners' Motion for Leave to File Reply Brief.

[14] The present case is different from *Indeck-Elwood*, where the permit issuer added a new condition to the permit without taking public comment on the condition, which would have authorized the permit applicant to construct a materially different facility than was the subject of public comment. 13 E.A.D. at 147-48.

[15] Issues Petitioners raise regarding possible impact on the OCS Permit (or the Region's analysis) that may occur if Cape Wind were to change the Project's construction staging location (*see* Petition at 29-35) are not ripe for review in this appeal because Cape Wind is entitled to proceed with the Project as described in its permit application.

VII. *ORDER*

The Board denies in its entirety the Alliance to Protect Nantucket Sound and the Wampanoag Tribe of Gay Head/Aquinnah's petition for review of the Outer Continental Shelf Permit, Number OCS-RI-01, that U.S. EPA Region 1 issued to Cape Wind Associates, LLC.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Cape Wind Associates, LLC, OCS Appeal No. 11-01,were sent to the following persons in the manner indicated:

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Dated: 5-20-2011

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